.IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA.

**Civil Revision No. 264 of 2002.**

*Judgment reserved on 30.8.2007.*

**Date of Decision: 5th October, 2007.**

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**Biptu Ram ……. Petitioner**

**versus**

**Balwant Singh and others …….Respondents.**

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Coram

***The Hon'ble Mr. Justice Dev Darshan Sud,Judge.***

Whether approved for reporting?[1]

For the Petitioner: Mr. K.D. Sood, Advocate.

For the Respondents: Mr. Om Parkash Sharma, Advocate.

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## ***Dev Darshan Sud, Judge.***

This is the plaintiff's revision against the order of the learned Trial Court allowing the application under Order 9 Rule 13 of the Code of Civil Procedure, instituted by the respondents/defendants for setting aside the *ex parte* decree which had been passed against them.

The successor-in- interest of late Shri Khushi Ram (who was the defendant) in the suit instituted by the predecessor-in-interest of the petitioner titled Sant Ram *versus* Khushi Ram, filed the application for

[1] Whether Reporters of Local Papers may be allowed to see the judgment?

setting aside ex parte decree passed against them. The respondents herein pleaded that their predecessor-in- interest late Khushi Ram who was the defendant in the suit, was never served and that Shri Sant Ram, plaintiff (predecessor-in-interest of the petitioner) had obtained an *ex parte* decree in Civil Suit No. 390/1993 on 16.1.1996 in connivance with the witnesses.

The pleadings in the application may be noticed. The applicants averred that the predecessor-in-interest of the respondents late Khushi Ram had died on 20.4.1998. The plaintiff Sant Ram died on 21.12.1996. The relevant portion of the pleading in the application is being considered herein below in order to appreciate the stand which has been taken by the respondents before the learned trial Court:-

> "4. That Sher Singh is serving in CRPF and is presently posted in North East State, Kehar Singh is presently posted at Rajasthan and Ranbir Singh is serving in Indian Army and is presently posted at Punch Rajouri Sector, and as such could not be made/joined as applicants hence they have been impleaded as proforma respondents.
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> 9. That Khushi Ram was prior to his death residing with the family of his son Ranbir Singh at Bharoon, who (Ranbir Singh) himself was serving in Indian Army.
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> 10. That deceased Khushi Ram was a patient of Paralysis and due to severe attack of paralysis in the year 1991 he was unable to move from his bed and was also not in a sound state of mind after the paralysis attack since 1991.
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> 11. That applicant No. 2 i.e. Ramesh Kumar was residing at Bharoon since 1991 and he frequently uses to visit the house of his brother Ranbir Singh to see his aged and infirm father and also to provide him medicines etc. for his well being.

12. That deceased Khushi Ram never informed his sons that he has ever received any summons from any court pertaining to any case, because he had never received any summons, as he was never served with any summons.

13. That everything was peaceful uptill the death of Khushi Ram and even after his death no one interfered nor tried to interfere in the peaceful possession of applicant over the suit land, and as usual applicants are receiving rent from the tenants and still the applicants are in actual physical possession of the suit land. Even Sant Ram himself during his life time did not interfere in our possession.

14. That to the very surprise of the applicants in the second week of June, 2000, a closed confident relative of applicant told them that respondent told him that Sant Ram has obtained a decree against the father of applicants i.e. Khushi Ram and he is going to file a suit for its implementation, which pertain to shops etc.

15. That at this only the applicants came to know that Sant Ram in collusion with process server and witnesses has obtained *ex parte* decree against Khushi Ram i.e. father of applicants and proforma respondents, who was never served with any summons and further more who was unable to move due to paralysis and was a person not in a sound state of mind.

17. That the summons were never served upon the father of applicant and he never appeared before this Hon'ble Court as he was unable to move, and was not in a fit state of mind due to paralysis since 1991. And all the proceedings before this Hon'ble Court were conducted by Sant Ram in collusion with process server and witnesses, and as such are not binding on Khushi Ram and after his death upon the applicant and proforma respondent Nos. 2 to 4."

These are the material portions of the pleadings setting out the facts on which the applicants seek an order for setting aside the ex parte decree passed against them.

This application was resisted by the petitioner herein. It was his specific stand that late Khushi Ram had been served in the suit on 18.11.1993 fixed for the hearing to be held on 18.1.1994 and a copy of the plaint had also been delivered to him at that time. The service of the defendant was effected at the address as given in the summons.

The orders passed in the case may be considered at this stage as they would be relevant for the purposes of testing the veracity of the statements made by the witnesses in support of the claim put forth by the respondents/defendants:-

> "18.1.1994. Present: B.K. Dixit Adv. for the plaintiff.
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> Defendant in person.
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> The case file taken up for conciliation. Be put up on 15.2.1994 for conciliation . The parties will be present on the said date.
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> Sub Judge Ist Class,
> Dehra Distt. Kangra, H.P.
>
> 15.2.1994.Present: As above.
>
> Ld. P.O. is on leave. To come up on 24.2.1994 for proper orders.
>
> Sd/
>
> 24.2.1994. Present: Sh. B.K. Dixit, Adv. for the plaintiff.
>
> File taken up today for proper orders.
>
> Let defendant be summoned for 12.8.1994 on fresh PF.

Sub Judge Ist Class,
Dehra Distt. Kangra, H.P.

12.8.1994. Present: Sh. R.P. Singh, Adv. vice Sh. B.K. Dixit. Adv. counsel for the plaintiff.

Defendant served for today but not present. The report is duly supported by the affidavit by the P.S. Hence defendant proceeded against ex parte. Now put up for plaintiffs ex parte evidence. To come up on 14.2.1995. PF and D.M. be filed within 15 days.

Sub Judge Ist Class
Dehra, Distt. Kangra, H.P."

The learned Trial Court, on a consideration of the evidence has held that there was no proper service of the notice of hearing on late Khushi Ram and that for the reasons given in the application, the *ex parte* decree was set aside. The petitioner is now in revision before this Court.

I have heard learned counsel for the parties and have gone through the record. Learned counsel for the respondents submits that revision cannot take the colour of a trial de-novo and there can be no re-appreciation of evidence. He submits that the matter having been considered in detail by the learned Trial Court which has decided the case on a proper appreciation of the evidence on record, this Court cannot substitute its findings for those arrived at by the trial Court.

Learned counsel for the petitioner submits that the findings are perverse and are not based on any evidence at all.

This court is aware about the limitation imposed upon it under Section 115 of the Code of Civil Procedure. What is to be seen is

whether the learned Court below has exercised its discretion on sound judicial principles or whether the findings which are arrived at are perverse that no reasonable person can come to such a conclusion.

Three issues were framed by the learned Trial Court namely:-

> "1. Whether there are sufficient reasons to set aside the order/decree dated 16.1.1996? OPA
> 2. Whether the application is within time ? OPA
> 3. Whether the application is not maintainable in the present form?"

These issues were decided in favour of the respondents herein. The first crucial question for determination was whether proper service had been effected on late Sh. Khushi Ram? The learned Trial Court held that summons Ext. AW-1/A fixing the date of hearing on 18.1.1994 were served by the Process-Server Ramesh Chand, AW-3. The court also notices that the Presiding Officer was on leave on 15.2.1994 and therefore, notices for appearance of the respondent-defendant Shri Khushi Ram were issued for 12.8.1994, which were purported to have been served by Shri Ishwar Dass, process server AW-4 and that receipt of summons had been acknowledged by Shri Khushi Ram on the summons Ext. AW-1/B. The learned Court concluded that evidence of the process servers did not inspire confidence as they had stated that Shri Khushi Ram was not known to them earlier. In the totality of the circumstances, it was held that in the absence of corroboration of the factum of service of the summons and of the identity of Shri Khushi Ram by an independent witness, it would not be proper to presume proper service. On the question of limitation, the Court held that the application was within time as the

petitioners or their predecessors-in-interest in the application had not been served in the suit and the allegations made in the application were proved.

Learned counsel for the petitioner submits that factual point as to whether the defendant had been served or not is not established from the facts on the record. It was submitted that late Shri Khushi Ram was served for 18.1.1994, on which date he was present in person in the Court. The matter was then taken up on 15.2.1994 when he was present in person and his presence has been recorded. He submits that this part of the court record remains unrebutted and clearly establishes that the defendant had notice of the next date of hearing which was fixed for 24.2.1994. He should have been present in Court either in person or through counsel as he was aware about the date and cannot plead ignorance regarding the pendency of the case. On 24.2.1994 none was present on behalf of defendant and therefore, summons were issued for 12.8.1994. He submits that no other corroboration is required to prove the fact that the defendant deliberately absented himself from court and was aware about the date, and the averments made in the application are not borne out from the judicial record.

Learned counsel for the respondents-plaintiffs submits that the provisions of Order 5 Rule 18 of the Code of Civil Procedure are mandatory in nature and require strict compliance in letter and spirit. He places reliance on a decision of the High Court of Delhi in **R.K. Sharma and others, etc. v. Ashok Nagar Welfare Association and Co. AIR 2001 Delhi 272**. There can be no dispute about this proposition of law. Provisions of Order 5 are to ensure that adequate notice of proceedings is given to the opposite party so that such party(s) can appear in the Court in

opposition to the claim filed against him/her. Learned counsel for the petitioner submits that although the provisions are mandatory but a slight irregularity in service would not make any difference. He places reliance on **Mt. Shivadulari Kuer vs. Bhagwati Charan Sahu AIR 1936 Patna 593.** He submits that when the respondent appeared in court pursuant to the summons AW-1/A which is same address as has been given in the second summon AW-1/B, there can be no presumption/assumption of the fact that second summons was not validly served. He submits that a process-server is not and cannot be expected to know every person personally. He supports his submissions by referring to the other material on the record to demonstrate that the evidence in support of the allegations by the petitioners is fabricated and not worth relying upon. Exts. R-1 to R-9 are the proceedings and pleadings of a case titled Milap Chand vs. Kuldip in which Khushi Ram, predecessor-in-interest of the defendants/respondents was one of the defendants. These show that he was regularly pursuing the matter in court. Ex. R-6 is a copy of the written statement filed by Sh. Khushi Ram in the Court of learned Sub Judge, Dehra on 12.5.1994, Ext. R-7 is his Vakalatnama filed in the Court on 20.1.1993. Ext. R-10 is a copy of the application moved on behalf of Sh. Khushi Ram in the Court praying for adjournment, stating that the case has been fixed for his evidence and that an adjournment may be granted since he is not keeping well for the last 3-4 days as he is 90 years old and is unable to attend the court. In these circumstances, learned counsel submits that averments made in the application that late Shri Khushi Ram was afflicted paralysis or was mentally incapacitated cannot be accepted.

After considering the entire material on the record, I have no doubt in my mind that the learned trial court was in clear error in holding that there was no proper service. In its eagerness to set aside the ex parte decree, the court has gone to the extent of stating that service of the summons AW-1/A is not in accordance with law as the process-servers AW-3 Ramesh Chand did not know defendant Shri Khushi Ram personally and that the affidavit of service and the identification on the summons was defective. I do not think that this conclusion was justified. It was the totality of the entire evidence which had to be considered and not merely the statement of the process-server. The record clearly establishes that Sh. Khushi Ram was pursuing another case with Milap Chand with vigour in the court of Sub Judge Dehra where the suit out of which the present revision arises was pending. An application for adjournment in that case shows that he was not suffering from paralysis or was otherwise incapacitated in attending to court matters. The record Ext. R-1 to Ext. R-9 establishes his active participation in court matters. Reverting to the facts of the present case, the defendant had been served and he appeared in court on 18.1.1994 and 15.2.1994 facts which are not controverted before me and which are borne out from the court record. He choose to be deliberately absent on 24.2.1994 despite the fact that on 15.2.1994 it was ordered in his presence that he should remain present in Court on 24.2.1994. There is no explanation for his absence. There is also no explanation as to why he could not engage counsel in the matter to represent him in Court. There can be no other inference save and except that he deliberately avoided his presence in the Court. The order dated 18-1-94 does not state that the Presiding Officer would be on leave on

15.2.1994. Obviously if that was the situation, case would not be fixed for proceedings for that date. Surely the Court should have been alive to this factual situation that irrespective of the service of summons, his absence on 24-2-94 remains unexplained. Moreover, as I have held that on both dates i.e. on 18.1.1994 and on the date when he was proceeded ex parte, the summons have been issued to him at the same address.

One other factor needs to be noticed. The respondents had averred that they came to know about the ex parte proceedings in the year 2000 from "some close relative". This is the material part of the pleading. That person has not been produced in evidence to show as to how he gathered knowledge about the passing of the ex parte decree and under what circumstances it was communicated to the respondents. In the circumstances, the only conclusion can be that in case such evidence would have been produced it would have been against the interest of the respondents.

In the totality of the circumstances, the case set up by the respondents cannot be accepted. The specious plea that no proper service was effected cannot be accepted as on 15.2.1994 the absence of the defendant was deliberate as no explanation has been given. His conduct also shows that he deliberately absented from the case and continued to attend proceedings in another case regularly either in person or through counsel.

On consideration of the entire material on the record, I hold that the findings given by the learned Court below are perverse and are not supported by any material on the record. This revision is accordingly accepted. The judgment and order of the learned trial court is quashed and

set aside. Order dated 10.5.2002 is quashed and set aside. There shall be no order as to costs.

**5th October, 2007.** **(Dev Darshan Sud),**
(cm) **Judge.**